United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1325

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

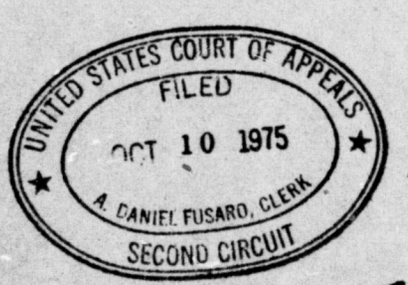
- against -

VICTOR LEO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND APPENDIX FOR APPELLANT



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LEONARD KREINCES, ESQ.,

Of Counsel

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

- against - DOCKET NO. 75-1325

VICTOR LEO,

Appellant.

----------x

BRIEF ON BEHALF OF APPELLANT,
VICTOR LEO

PRELIMINARY STATEMENT

Appellant, VICTOR LEO, appeals from a judgment of the United States District Court for the Southern District of New York, rendered August 4, 1975, convicting him of making a false statement on a business loan application in violation of 18 U.S.C. 1014, and sentencing him to two years probation, and directing him to make restitution by regular payments.

This action was tried to a jury on July 8, 9 and 10, 1975, HON. HENRY F. WERKER presiding. The Trial Court continued the appellant to bail in the original sum posted. A notice of appeal was filed on August 11, 1975.

THE GOVERNMENT'S CASE

At the outset of the presentation of proof, the appellant moved for dismissal of the indictment based upon selective prosecution. (5). That motion was denied and we shall discuss this aspect of the case in our points and authorities.

The first witness for the Government was FRANK G. SPIZZIRRO, the Senior Vice President of the Hudson Valley National Bank, in Yonkers, New York, who dealt directly with the appellant. He had twenty years experience as a banker (21).** He testified that he first met the appellant after being referred to him by one DAVID BREITER for the purpose of a business loan of $5,000.00. He gave MR. LEO a corporate and personal financial statement as well as a loan application to be filled out. These executed documents were introduced into evidence.

The Government then introduced two mortgages which the appellant and his wife executed upon their one-family home, to one DOMINICK A. SQUEGLIA. The Government asked MR. SPIZZIRRO to characterize the mortgage "in layman's terms". This question was objected to however, the objection was overruled. (32-33).

On Cross-examination MR. SPIZZIRO testified that he thought the loan was to help the appellant to purchase a flower shop (35) known by BRENTWOOD FLOWER SHOP, INC., and that he knew

** [Numerals in parenthesis refer to the official court reporter's minutes of the trial unless otherwise indicated].

the shop to have been there for twenty years.(36). He also stated that the Bank had an installment loan officer at the time although only MR. SPIZZIRRO chose to deal with MR. LEO. (37). MR. LEO'S application could be characterized as an installment loan. (37). MR. BREITER was a supervisor of auditors with the accountants for the Bank.(39). He knew and patronized DR. BREITER, his father (40).

MR. SPIZZIRRO'S authority on loans was $10,000.00 unsecured and $25,000.00 secured. (45). He could not remember how many unsecured loans he approved between May 1972 and September 1973 (48). He approved the loan to MR. LEO. (54). He could not say whether the loan was made the same day that the personal financial statement was brought into the Bank. (55). He does not recall telephoning MR. LEO that the loan was approved. (55).

MR. SPIZZIRRO testified that he never asked MR. LEO about the information in the personal financial statement (61-62). He testified though that MR. LEO "volunteered" the information concerning the note receivable of $63,000.00 (61-62). He characterized the loan of $5,000.00 to MR. LEO as small (66). He could not tell counsel how long it took him to read the personal financial statement. (68).

This witness then acknowledged the fact that he had testified in the Grand Jury to the effect that the loan was made

to BRENTWOOD FLOWER SHOP, INC., because it was a going business. (69) and because DAVID BREITER had referred the customer to the Bank. (70-71). He never went over the personal financial statement with MR. LEO. (74).

Then on redirect examination in spite of his total inability to remember the specifics of the personal financial statement, he testified that "to the best of his knowledge", he viewed the statement "prior to okaying the loan". (81). On recross-examination, he states, in effect, that the reason for his answer on redirect examination was because viewing the personal financial statement was the normal procedure of each day at the Bank. (83).

MR. DAVID BREITER then testified for the Government. He is the son-in-law of the Seller of the flower shop bought by MR. LEO. (88). He is also a certified public accountant. (88). He referred MR. LEO to MR. SPIZZIRRO for a loan (90). MR. LEO asked him to assist him in completing the several applications for the Bank. (91). The forms are in MR. BREITER'S handwriting based upon information given to him orally by the appellant. (90-91).

On cross-examination, MR. BREITER stated that the date of the personal financial statement, October 1, does not reflect

the date of its preparation. (111). He stated that the personal financial statement was filled out in the flower shop at the counter in a few minutes (112). He stated that "[w]e didn't really get into great detail on it". (114). He said MR. SPIZZ-IRRO knew that MR. BREITER was the son-in-law of MRS. SARDONE, the seller of the flower shop. (115). He admitted that MR. LEO told him about two florist shops in Elmont and Jericho, New York. (119). He did not recall their value and he did not ask MR. LEO about their value. (119). He then testified as to how the statement was prepared - on a question and answer basis. (119-121). He did not describe contingent liabilities to MR. LEO. (121) or is that term set forth in the statement (121). He did place "N/A" in answer to "contingent liabilities" which he meant as "none". (122).

He testified on redirect examination that MR. LEO "did not state that the bank needed it [the personal financial statement] in order to grant the loan. He stated that the bank needed it". (129).

The next Government witness was FRANCIS J. RIGO, who sold his florist business in Pelham, New York to a partnership composed of MR. LEO, one GEORGE HADGES and one JAMES ABEL. (134). He took a mortgage back on MR. LEO'S home (139). The purchase

price was paid in installments and on October 5, 1973, the date of the personal financial statement, the balance thereof was $19,000.00. (139).

On cross-examination, he admitted that the aforesaid three persons still owed him the balance of the purchase price of the store. (143).

The next witness was JOSEPH FEBLES an employee of G.M.A.C. He testified that on October 1, 1973 the appellant owed G.M.A.C. the sum of $1,907.64. He testified on cross-examination that on September 28, 1973, a check in the sum of $1,907.64 was returned by G.M.A.C. to appellant having been received by it on September 20, 1973. (163-164).

THOMAS DARCHI, an employee of Prudential Insurance Company then testified that on October 5, 1973, the cash surrender value of MR. LEO'S policies with that firm was $465.82 and $1,043.69. (172-173). On cross-examination he testified that it would be several days for an assured to ascertain cash surrender value and an assured would need his policy to compute cash surrender value.

WILLIAM VARVARO, an employee of The Whitestone Savings & Loan Association, testified that the balance of the mortgage on the one-family residence of MR. LEO, on October 5, 1973, was

the sum of $14,007.11.

JAMES ABEL then testified for the Government. He has a record of gambling and policy convictions. (190). He was a former partner of the appellant. (191). He invested the sum of $300.00 in the purchase of MR. RIGO'S florist shop. (194). He worked there for three months (195) and claimed $8,000.00 for his share of the business (194).

On cross-examination, he admitted working there for three months on a half-day basis (196). He had no experience in the florist business. (196). He withdrew from the partnership (200) and never told his accountant how little work he had put into the store (201). His claim was finally settled for $750.00, $120.00 of which was paid to the Referee in Court proceedings, and $330.00 of which was paid his attorneys. (204). He received the sum of $300.00, his original investment. (205). He admitted that MR. LEO'S investment approached $7,400.00. MR. ABELS testified that MR. RIGO never released him from the terms of the payment of the balance of the purchase price (212). Finally, he said that he knew of the sale by appellant of the florist shop in Pelham, New York, however, he did nothing to attack it. (214-5).

THE DEFENSE

BARTON DENIS EATON, an attorney, testified for the defendant. He represented the appellant in 1973. (225). He testified that GEORGE HADGES withdrew from the partnership in Pelham soon after it was formed (227). He stated that MR. RIGO never released MR. ABEL from the note in connection with the sale of the florist shop. (241). He testified as to the bona fides of the contract and note receivable of $63,000.00, which was introduced into evidence. (243-5). MR. EATON then testified as to the basis of the two mortgages to MR. SQUEGLIA. (249-251) and how remote to the transaction they really were.

The appellant then testified that VANTRONICS, INC., of which he is the sole stockholder, owned two florist shops in Jericho and Elmont, New York (290-293). He thereafter related the extent of his investment in these stores and the lease agreement to the Jericho store was introduced into evidence. (293-6). These stores were in operation in October, 1973. (298-9). He then testified that MR. BREITER referred him to MR. SPIZZIRRO for a loan (301-302). MR. SPIZZIRRO told MR. LEO to borrow $5,000.00 although he needed $2,500.00 to $3,500.00 (303). This testimony is unrebutted. He testified that MR. BREITER helped him prepare the corporate financial statement at his store in Harrison

October 1, 1973 (305-6). This statement was prepared from the schedules annexed to the contract for the sale of a florist shop in Harrison, New York. (306-7). Then MR. SPIZZIRRO hands another form to the appellant to fill out. (307). He then testified as to how the personal financial statement was completed by MR. BREITER and himself in the Harrison store (308). The figures he gave to MR. BREITER to insert in the statement was estimates (312). He omitted a life insurance policy from The Equitable Life Insurance Society of the U.S. in the face amount of $50,000.00. (312-3). He was receiving payments of $750.00 per month on the note receivable of $63,000.00 . (313). He had estimated the figure on his home. (314). MR. BREITER had advised him not to include the stores in Jericho and Elmont (315). He stated that the words "contingent liabilities" was never mentioned to him by MR. BREITER and that he would not have known its meaning anyway (317). Furthermore, in October, 1973, he assumed that G.M.A.C. was fully paid since a check was mailed to them in September, 1973. (319). The entire statement was prepared in five minutes (322). The loan was disbursed on the same day that the statement was brought into the bank - the entire process took forty minutes (323).

POINT I

THE COURT ERRED IN ITS CHARGE TO THE JURY CONCERNING THE DEFINITION OF "KNOWINGLY".

The charge of the Court which is objected to is found at pages 388-389 of the Trial Transcript and reads as follows:

> " You may consider in determining whether the defendant acted with guilty knowledge or intent the fact, if you find it true, that the defendant made other false statements similar to those charged in the indictment.
>
> In this connection, I would instruct you, too, that if a statement is false and if a defendant did not know it was false, he would nevertheless be acting wilfully if he deliberately closed his eyes to the facts which he had a duty to see.
>
> A person may not circumvent criminal sanctions merely by deliberately closing his eyes to the obvious risk that he was engaging in unlawful conduct".

Timely objection to this charge was made. (393).

Firstly, the text of this charge is totally different from Request No. 5 of the Government's Requests to Charge, from which it is adopted.

Secondly, the 1974-75 Supplemental Service Volume I of the Federal Jury Practice and Instructions, Devitt and Blackmar,

at Section 16.07, a discussion of such charge is found. Of course, United States vs Olivares-Vega, (2d Cir. 1974) 495 F. 2d 827, cert. denied 95 S. Ct. 494, dealt with narcotics possession, a subject totally different than that at bar. The difference with the charge is that it was not given with the language dealing with "knowingly" which is the only word found in the statute, 18 U.S.C. 1014. In fact, in LaBuy Jury Instructions No. 4.05, 33 F.R.D. 523, 553, the charge is as follows:

"The word "knowingly" as used in the crime charged means that the act (or omission) was done voluntarily and purposely, and not because of mistake or accident. Knowledge may be proven by defendant's conduct, and by all the facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate".

Thus the jury has the entire gamut of options from negligence to outright intent, however, in the charge sub judice, the language stands out of context and is repeated twice. The jury is assured by the charge that the "risk" that he is "engaging in unlawful conduct" is obvious" to the defendant. Furthermore, the word "wilfully" is used in the charge - it should be "knowingly" i.e., one is acting "knowingly" if one deliberately

closes his eyes to such conduct.

Counsel asked that the "deliberate" aspect of the failure to see be explained to the jury further along with the fact that the defendant intended to falsify the statement by closing his eyes. This request was denied.

In fact the word "intentionally" in LaBuy's Instruction No. 4.05 was discussed by the 7th Circuit in United States vs Grizaffi, 471 F. 2d 69. (1972):

> "The defendant Svejcar objects to the use of LaBuy Instruction No. 4.05 LaBuy Manual on Jury Instructions in Federal Criminal Cases, 33 F.R.D. 523, 553 (1963). He claims that the last sentence of the instruction-"No person can intentionally avoid knowledge by closing his eyes to facts which prompt him to investigate" - is allowable only when qualified with specific instructions informing the jury that guilt cannot be based on negligence. We disagree. The instruction plainly states that knowledge cannot be "intentionally" avoided, and, consequently, it does not suggest that negligence is an acceptable basis for a finding of guilt. The instruction is a proper statement of the law. See United States v. Squires, 440 F. 2d 859, 864 (2d Cir. 1971). Furthermore, the court informed the jury in other instructions that convictions could not be based on mistake or accident and that good faith was a defense".

As a further example of the requirement of law that one's closing of one's eyes must have a conscious purpose, this

Circuit in 1971, decided United States vs Squires, 440 F. 2d 859, 863, 864, wherein the Court stated:

> "As both assignments of error hinge on the proper definition of "knowingly" within the meaning of the statute, we turn first for enlightenment to the legislative history of the statute. The Committee reports state that §922(a)(6) prohibits the making of false statements or the use of any deceitful practice (both knowingly) by a person in connection with the acquisition or attempted acquisition of a firearm". This passage clearly indicates a legislative intent to make knowledge a key element of the offense prohibited by the statute, but, although it may intimate that the word "knowingly" is to be used in its normal sense, it does not foreclose more sophisticated definitions. The Supreme Court, faced with a similar lack of legislative definition, adopted the Model Penal Code formulation:
>
> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
>
> This formulation is merely a more comprehensive version of the lay definition of "knowledge" in that it recognizes that there are many facts which one does not "know with certainty", and it comports with the use of "knowingly" in other criminal statutes". (Cases thereafter cited).

It is respectfully submitted that the import of the charge in this case create an affirmative duty upon defendant to investigate, thus charging him with what "he should have known". In this regard, this Court said, in Squires, at P. 863:

> "The cases cited by the Government that deal with the enforcement of the Securities laws are distinguishable. In those areas of fiduciary responsibility the persons issuing statements are under an affirmative duty to investigate, and it is entirely appropriate to include "should have known" within the definition of "know". We find those cases inapplicable here and we adopt the Model Penal Code formulation for the purposes of the statutes at issue in this case".

The Court then went on to a general discussion of the jury charge, at P. 864-5:

> "Turning from general principles to the present case, we find that the trial judge instructed the jury: "Thus, if you find * * * that had [the defendant Squires] read the form he would have known that he was prohibited from receiving the firearm, * * * you may find that the defendant acted wilfully and knowingly, even though he was actually ignorant of the prohibition of this statute". The primary error in this instruction is that it is internally inconsistent. If Squires "were actually ignorant of the prohibition of [the statutes cited in the form], "it should be evident that "had he read the form" he

> would not "have known he was prohibited from receiving the firearm". The instruction is also erroneous because it fails to differentiate between the two types of ignorance which Squires claimed to have insulated him from being guilty of "knowingly" making the false statement he concedes he made - his ignorance of what he was signing because of his purported failure to read the form, an ignorance of fact; and his ignorance as to what was prohibited by the cited statutes, an ignorance of the law. In order to convict Squires under §922(a)(6), it was necessary for the jury to find either (1) that Squires had read the form and was "aware of a high probability" that he was prohibited by the cited statutes from receiving a firearm in interstate commerce, or (2) that he deliberately avoided reading the form and that he was prohibited by the cited statutes from receiving a firearm in interstate commerce. The trial court's instructions were clearly insufficient on this point."[12]

The important thing is that if one is mistakenly or carelessly unaware of criminal conduct then he must be acquitted however, in order to convict him of such criminal conduct, the Government must prove that he was unaware "consciously" and that he avoided the truth "consciously". No such proof is present in this case as will be discussed in Point II of this brief. It is interesting that after the Government's case was completed and

upon defendant's motion for judgment of acquittal, the Government then stated that in view of the brevity of the preparation of the personal financial statement amounts to an interest on his part to so falsify. Although the Court reserved decision on the same motion after the entire trial, in effect, the Court adopted the Government's position. It is submitted that more is needed to convict the appellant.

In fact, in a narcotics case before this Circuit, United States vs Joly (1974), 493 F. 2d 672, it was decided that the following charge did not constitute plain error:

> "It is obvious that as to all three counts, the critical question is whether the defendant, Mr. Joly, knew he had cocaine. And actual knowledge that the defendant was bringing and importing cocaine into the country is an essential element of each of the offense charged.
>
> You may not find the defendant guilty of any count unless you find beyond a reasonable doubt that he knew he was importing or bringing cocaine into the country. The fact of knowledge may be established by direct or circumstantial evidence just as any other fact in the case. Knowledge may be proved by the defendant's conduct since we have no way of looking into a person's mind directly.
>
> The defendant has flatly testified that he had no such knowledge. Now, in this connection bear in mind that one may

> not wilfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law.
>
> If you find from all the evidence beyond a reasonable doubt that the defendant believed that he had cocaine and deliberately and consciously tried to avoid learning that there was cocaine in the package he was carrying in order to be able to say, should he be apprehended, that he did not know, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.
>
> In other words, you may find the defendant acted knowingly if you find that either he actually knew he had cocaine or that he deliberately closed his eyes to what he had every reason to believe was the fact. I should like to emphasize, ladies and gentlemen, that the requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of the defendant".

Certainly in narcotics, where it is difficult for a defendant to say that he does not have the requisite mens rea to commit the crime because of the very furtive nature of its commission, JUDGE WEINFELD, sitting below, felt it imperative to use the words "deliberate avoidance of positive knowledge".

We submit that the charge as made below was severely prejudicial to the appellant in its text, in its context and in its repetition at the substantive end of the charge.

POINT II

THE PROOF DID NOT SUPPORT APPELLANT'S CONVICTION BEYOND A REASONABLE DOUBT.

It would be impertinent of appellant to hypothesise on the reasons for the lower Court's reservation of its decision of the appellant's motion for acquittal. However, the Court may have felt that the "closing one's eyes" doctrine under LaBuy, supra, was sufficient to cover the proof. It is appellant's position that there was no proof of any conscious disregard or purpose on the part of appellant and all the Government's witnesses, except MESSRS. SPIZZIRRO and BREITER, merely substantiated the accurate amount of money for each category in the personal financial statement which the Government claims was not factual. The testimony of MRSSRS. SPIZZIRRO and BREITER and that of appellant's witnesses clearly establish that:

(a) it was a same day loan;

(b) the appellant volunteered information concerning the $63,000.00 note receivable;

(c) the appellant gave estimates to MR. BREITER;

(d) MR. BREITER said that the statement was not completed in detail;

(e) the value of appellant's other stores in

Jericho and Elmont were not set forth;

(f) the claim of MR. ABEL was meritless and unfounded;

(g) MR. SPIZZIRRO told MR. LEO to borrow $5,000.00;

(h) MR. SPIZZIRRO had unlimited authority to loan money up to $10,000.00 to MR. LEO;

(i) the statement was filled out within a very short time;

(j) MR. LEO was a referral to the bank from MR. BREITER.

Was this statement submitted to the Bank for the purpose of influencing it? Was it necessary under all the circumstances? These circumstances consisted of the genesis of the loan (from MR. BREITER) and the fact that the loan was credited to the corporate bank account within forty minutes of filing the statement. The Bank had a corporate statement of a going business - one which was twenty years old. The loan was small. MR. SPIZZIRRO'S authority permitted him to loan at least that sum. The personal statement in addition to the statement of the actual borrower, the corporation, was a mere formality.

The case of United States vs. Kramer, (10th Cir. 1974) 500 F. 2d. 1185, is strikingly similar in that the question of

purposeful influence was considered. A reading of that case reveals the fact that one charged under the statute as here must knowingly file a false statement to influence the Bank. We submit that there has been no evidence to cast appellant in a guilty light.

It is interesting to note that the net worth of the appellant varied from the statement's net worth by approximately ten (10%) per cent. The Government chose to use the issue of collateral mortgages and some variance on the application to the Bank (over appellant's objection) as evidence of similar acts. However, the Government did not sustain the allegations of the indictment viz., that the appellant misrepresented his net worth. The net worth varies as follows:

(a) LIFE INSURANCE

Statement	$10,000.00
Proof	1,500.00
Difference	$ 8,500.00

(b) REAL ESTATE MORTGAGES PAYABLE

Statement	$10,000.00
Proof	14,000.00
Difference	$ 4,000.00

Therefore the total sum of money at variance is

$12,500.00, approximately a ten per cent (10%) difference. Is not such variance, as a matter of law, inconsequential to cast one in criminal liability? Of course, the jury heard about collateral mortgages and a mis-statement concerning how long MR. LEO was in the florist business. Did the jury really remember the specific allegations of the indictment in its deliberations? The Government failed to prove the allegations of the indictment viz., misrepresentation of net worth. Certainly this aspect of appellant's arguments bears heavily upon Point I of this brief in that there can be no deliberate conduct by appellant in connection with such minor inaccuracies. The jury should not have received the case. The appellant's motion for a judgment of acquittal at the conclusion of trial, should have been granted.

The foregoing exposition is also submitted in support of the motion made by appellant at the outset of the trial based upon selective prosecution. We submit that issue for this Court's consideration is that any variance in any final statement submitted would render anyone culpable under the statute. To require one to be diligent and prudent in completing such statements for the purpose of accuracy is acceptable. However, to cast one in criminal liability for his failure to do so is unconstitutional. There is no warning on such financial statements as on the forms

for possession of firearms discussed in U. S. v. Squires, supra.

We submit that to prosecute under the statute without requiring notice to the appellant violates one's constitutional rights and further is not what the statute contemplated.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully Submitted,

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Of Counsel

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE WERKER

75 CRIM. 207

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	George Wilson AUSA
	791-1953
VICTOR LEO	
	For Defendant: Donald Schin
	260 Harrison
	Harrison, NY
	914-835-1704

(01) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DI
J.S. 2 mailed	Clerk					
J.S. 3 mailed	Marshal					
Violation	Docket fee					
Title 18						
Sec. 1014 & 2						
False statement to bank.						
(One Count)						

DATE	PROCEEDINGS
2-28-75	Filed indictment. B/W ordered. B/W issued.
3-10-75	Deft.(atty. present) Pleads not guilty. Motions returnable in 10 da Bail fixed at $5,000. P.R.B. Case assigned to Judge Werker for all purposes. Pollack,J.
03-12-75	Filednotice that deft. is represented by: Donald Schindel c/o Garner and Kreince 260 Harrison Ave. Harrison, NY 914-835-1704
04-04-75	Filed the following papers received by the office of Mag. Raby: docket entry sheet, indictment warrant, SDNY, disposition sheet, appointment of counsel notices, and appearance bond in the amt. $5,000 PRB without security.
	(Orr)

DATE	PROCEEDINGS
05-21-75	Filed defts. affdt. andnotice of motion for an order continuing the trial from July 7,1975 to July 21,1975,bill of particulars,etc. ret. on: May 22 1975 at 10am.
06-09-75	Filed govts. affdt. of George Wilson in opposition to defts. motion for bill of particulars,discovery.
06-09-75	Filed govts. memorandum of law in opposition to defts. motion for bill of particulars and discovery.
06-09-75	Filed memo end. on defts. motion dated May 21,1975---Defts. motion for continuance is denied. The trial is scheduled for July 7, 1975 at 10am. Motion for bill of particulars is granted as to (b) and (b)(3) and is denied as to (b)(2). Motion for inspection is granted as to (c)(1) and (c)(3) and is denied as to (c)(2). So ordered,Werker,J. m/n
07-01-75	**Filed govts. bill of particulars.**
07-07-75	**Filed govts. requests for the voir dire.**
07-07-75	**Filed govts. request to charge.**
07-07-75	**Filed govts. requests for the voir dire.**
07-07-75	**Filed govts. request to charge.**
07-08-75	Deft.,ABSA and defts. atty. present. Jury trial begun before Werker,J.
07-09-75	Jury trial continues.
07-10-75	Jury trial continued and concluded. Jury verdict of GUILTY. PSI order. Sentence adj. to Aug. 4,1975. Bail continued. Werker,J.
08-04-75	Filed JUDGMENT(atty. Leonard Kreinces,present)--the imposition of sentence is suspended and the deft. is placed on probation for a period of TWO(2) YEARS subject to the standing probation order of this court. This probation to run concurrently with the sentence imposed this date on indictment 75 CR 208(mel) by the Hon. Morris E. Lasker,D.J. Special conditions of probation being that the deft. make restitution in regular payments as directed by the probation office. Werker,J. (copies issued)
8-11-75	Filed notice of appeal to USCt from judgment of August 4, 1975 of Werker, J. (copies)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

15

GEW:ets

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

INDICTMENT

VICTOR LEO, :

75 Cr. 207

Defendant. :

COUNT ONE

The Grand Jury charges:

On or about October 1, 1973, in the Southern District of New York, VICTOR LEO, the defendant, unlawfully, wilfully and knowingly did make and cause to be made a false statement and report for the purpose of influencing the action of the Hudson Valley National Bank, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, upon an application and a loan, for $5,000.00 by the Brentwood Flower Shop, Inc., in that the defendant represented and caused to be represented to said bank that he possessed a net worth of $127,318.00, when, in truth and in fact, as the defendant then and there well knew, said representation was untrue.

(Title 18, United States Code, Sections 1014 and 2.)

FOREMAN

PAUL J. CURRAN
United States Attorney

(In open court)

THE CLERK: The Court is about to charge the jury. Any spectator wishing to leave the courtroom must do so now or wait until the completion of the Court's charge.

Will the marshals secure the door, please.

THE CHARGE OF THE COURT

THE COURT: Now, ladies and gentlemen of the jury, now that all of the evidence is in and counsel have summed up their respective contentions, the time has come for you and I to perform our respective functions in the administration of justice in this case.

I will not review or comment upon the evidence since I think counsel have sufficiently done so.

As I stated to you at the outset, it is my duty to instruct you as to the principles of law to be followed and it is your duty to accept those instructions as they are given by me and apply them to the evidence in this case.

The indictment against this defendant is not evidence and it does not carry with it any presumption of guilt. It is merely a means by which the defendant and the jury are informed of the nature of the charges or accusations and the means of bringing the defendant to

trial.

The defendant in this case has pleaded not guilty and by that plea has put in issue each of the elements of the charge made against him.

You may not give any weight whatever to the fact that an indictment has been returned against the defendant. It is your duty to determine the facts as derived from your consideration of the evidence in this case and then applying the principles of law to decide whether the defendant is or is not guilty of any of the charges made against him.

You are the sole and exclusive judges of the facts. If your recollection of the evidence differs in any way from the recollection of counsel, your recollection controls and should be relied upon by you.

You must approach your duty with complete fairness and impartiality. The Government and this defendant are equally entitled to justice in this court.

The fact that this prosecution is brought in the name of the United States of America does not entitle the Government to any greater consideration than any other litigant would get, but by the same token, it is entitled to no less consideration.

The issues in this case must be decided on the

evidence and on the law.

Before I turn to the indictment in the case and the charge that is made against the defendant here, let me first give you a few basic principles that should govern you in your deliberations.

Under your oaths as jurors you should not and cannot alow consideration of the punishment the defendant may receive if he were found guilty to enter into your deliberations or to affect or influence your judgment in any way.

The duty of imposing sentence in the event of a conviction would rest exclusively upon the Court and the Court's own conscience.

During the trial I have been called upon to make rulings from time to time. I have sustained some objections and I have overruled others, and on one or two occasions I have ordered testimony stricken and have advised you to disregard it.

It is important in the performance of your duties that you limit your consideration to the evidence that was actually received in the case and not to give any consideration to any evidence that was stricken.

It is equally important that you do not draw inferences against either side because of any objections

that their counsel may have made during the course of trial or any arguments that counsel may have made or the fact that it may have been necessary from time to time to engage in these conferences at the side bar.

Under our system of justice in this country it is the function and duty of counsel to object to anything that they think is legally improper and they would be remiss in their duty if they failed to do so,but it is my function and duty torule on these questions of law, and I would be remiss in my duty, too, if I failed to make such rulings, even though sometimes they may not have been to the liking of some particular counsel, and that goes for counsel for the Government as well as for the defendant.

If during the trial from my rulings or questions that I put to the witnesses you got the impression that I personally have any views on the credibility of any of the witnesses or on the weight to be given to their testimony or to the proof or to the merits of the case, please disregard it.

It is not my intention to imply or express any opinion nor any views to you with respect to the facts in the case or the merits or the credibility of any witness. Thatis your sole and exclusive function.

The indictment, as I have said, is in itself not evidence of guilt and it does not detract in any way from the presumption of innocence with which the law surrounds the defendant unless and until the guilt is established to your satisfactory beyond a reasonable doubt.

Now, under our law every defendant, and that is true of the defendant in this case, is presumed to be innocent. That presumption of innocence is in favor of the defendant throughout the entire trial and even into your deliberations in the jury room.

It is overcome only if, as, and when you determine that his guilt has been established beyond a reasonable doubt.

The burden is upon the Government to estbalish his guilt beyond a reasonable doubt and that burden applies to each and every essential element of the crime charged against the defendant. It also remains with the Government right down to the end of the trial.

I have mentioned the term "beyond a reasonable doubt." What does that mean? As the phrase implies, it means a doubt based on reason or a doubt that appears either in the evidence or the lack of evidence in the case, including evidence that may have been elicited on

cross-examination of different witnesses that have appeared before you.

It is not, of course, a speculative or an imaginary doubt or a doubt based upon emotion or sympathy, or upon what some juror may consider to be an unpleasant duty.

On the other hand, the Government is not required to prove the defendant's guilt beyond any possible doubt or to a mathematical or absolute certainty.

That measure of proof is seldom possible in human affairs.

What you should do is review, analyze, compare and weigh the evidence that has been adduced here against the defendant and decide what you believe.

If that process produces a certain belief or conviction in your mind such as would induce a prudent person to act without hesitation in a matter of importance to himself or herself, then you may say that you have been convinced beyond a reasonable doubt.

If, on the other hand, your mind is wavering or uncertain to a point where you have a doubt that would cause a prudent person to hesitate to act in a matter of importance to himself or herself, then you have not been convinced beyond a reasonable doubt and you should acqu

the defendant.

I want to discuss with you at this point the types of evidence in general and you may apply them yourselves to the facts in this case.

There are two types of evidence. There is direct evidence and there is what you frequently have heard referred to as circumstantial evidence.

Direct evidence is where a witness testifies to what he saw, what he heard, what he observed with his own senses, something that he knows of his own knowledge.

Circumstantial evidence is evidence of facts and circumstances from which a person might infer connected facts that reasonably follow in common experience from the facts that have been proved.

Circumstantial evidence is, of course, entitled to no less weight than direct evidence.

In either case the inference or the inferences that you draw from it and the weight that you give to those inferences is going to depend on the credibility and on the weight you extend to the underlying evidence as a basis for inferring another fact from that evidence.

An inference is a logical, reasonable deduction from certain facts. It must not be based upon mere suspicion or guesswork. It must be based upon evidence.

The Government in this case asks you to draw one set of inferences from certain circumstances that have been introduced into evidence, whereas the defendant draws into question the reasonableness of such inferences.

It is going to be up to you and you alone to decide what inferences you are going to draw.

Let me give you an example of circumstantial evidence. You recall in the old story of Robinson Crusoe where Robinson Crusoe thought he was all alone on an island and how one day he saw footprints in the sand on the beach.

He did not see a man walking on the beach, but he immediately drew an inference from the fact of the footprints that a man had in fact been walking on the beach.

That is an example of circumstantial evidence .

It is for you to determine, and you alone, what weight will be given to the evidence, the credibility that you will extend to the witnesses and the reasonable inferences which are to be drawn from the evidence you have heard.

In judging the credibility of witnesses and in determining the weight to be given to his testimony you may consider the witness' demeanor and manner while on the witness stand, the character of his testimony as

being probable or improbable, the reasonableness of his testimony, the consistency or inconsistency of statements made by him on the witness stand, patent omissions and discrepancies in his own testimony or between the testimony of different witnesses,contradictory testimony, whether his story dovetailed with the rest of the credible testimony in the case, and whether or not it was memory testimony given years after the occurrence of events.

The testimony of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to a defendant should be considered with caution and weighed with great care.

If you find that any witness has wilfully testified falsely to any material fact, it is up to you to disregard all of his testimony or to credit such parts as you think credible and reliable.

You should remember in this connection that no witness is entitled to any greater or lesser degree of credit in advance because of his sponsorship; specifically the fact that a witness is called by the Governme. is not in and of itself any reason to give him more credit or less credit solely because of the fact that he was called by the Government.

Now, the greater a person's interest in the case,

the stronger the temptation obviously to testify falsely.

The interest of a defendant who takes the stand is of a character possessed by no other witness. Manifestly he has a vital interest in the outcome of the case. This interest is one of the matters which you may consider along with all of the other attendant circumstances in determining the credibility of the defendant.

It does not mean to imply in any way, shape or form, that you may not find that he was telling the absolute truth with respect to every item that he testified to.

Now, the charge in this case-- first I will read to you the indictment which I will send into the jury room with you.

On or about October 1, 1973, in the Southern District of New York, Victor Leo, the defendant, unlawfully, wilfully and knowingly did make and cause to be made a false statement and report for the purpose of influencing an action of the Hudson Valley National Bank, a bank the deposits of which were then insured by the Federal Government Insurance Corporation upon an application and a loan for $5000 by the Brentwood Flower Shop, Inc. in that defendant represented and caused to be represented to said bank that he possessed a net worth of

$127,318 when in truth and in fact, as the defendant then and there well knew, said representation was untrue.

The law in this case is Title 18, Section 1014, which reads in pertinent part:

"Whoever knowingly makes any false statement or report or wilfully overvalues any land, property or security for the purpose of influencing in any way the action of any bank, the deposits of which are insured by the Federal Deposit Insurance Corposration, upon any application or loan shall be guilty of a crime."

This law has nothing to do with defrauding the Government or whether or not the Government or the bank involved was actually defrauded.

The section is directed at applications for loans and makes it a criminal offense to make a false statement to influence the action taken olnsuch application.

Parenthetically it has nothing to do with what action was taken on the application. The qustion is the purpose with which a person made a statement. The essence of the crime is the making of a false statement for the purpose of influencing in any way the action of a bank from which a loan is sought.

The law focuses specifically on the application for the loan. The statute does not require proof that

the bank officials relied on the alleged false statements or made a loan to the defendant.

So, too, it is of no consequence whether any part or all of a loan which might have been made has subsequently been paid back.

The statute has nothing to do with defrauding the bank.

In other words, whether the false statements accomplished the purpose intended is irrelevant.

Now, a statement, including a statement in a claim or document, is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made.

You will notice that the statute in question does not require that the false statement or wilful overvaluation be material. It only requires that it be knowingly made or wilfully overvalued.

The Government consequently does not have to prove materiality beyond a reasonable doubt.

You may consider in your deliberations, however, whether the materiality of any statement which you may determine to be false or which you find to be knowingly made, or which you feel or find was wilfully overvalued might go to prove beyond a reasonable doubt that they were

made for the purpose of influencing in any way the action of any bank.

The statute does not make any mention of any amount to which the person may have applied for. Therefore, you may not consider whether the application involved $5000 or any amount. That, too, is irrelevant.

The purpose of the defendant is obviously not simply to be determined by the bare facts set up in the various documents. It is to be set up or it is to be found only in all of the circumstances surrounding this transaction.

If you find, therefore, that even though the knowing and false statement was made knowingly or that an asset was wilfully overvalued but that it was not made for the purpose of influencing the bank you must acquit the defendant.

Now, it is not necessary for the Government to prove that the defendant knew that the bank to which the loan application was submitted was insured by the Federal Deposit Insurance Corporation, bur rather the proof only need show that the defendant knew thatit was a bank which he intended to influence.

In order for you to convict the defendant of false statements as charged by the Government, the Government

must have proved beyond a reasonable doubt to your satisfaction (1) that the defendant either made or caused to be made a false statement or a report on or in connection with an application for a loan from the Hudson Valley National Bank; (2) that the defendant knew the statement or report to be false; (3) that the statement or report was made in,upon or in connection with a loan application to a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and (4) that the false statement or report was made for purposes of influencing the bank's action on the loan application.

Now, evidence that a witness has been convicted in the past of certain crimes may be considered by you in determining that witness' credibility. By this I mean you may consider the prior convictions in determining that witness' worthiness of belief.

There are three terms which are used in the indictment; namely, unlawfully, wilfully and knowingly, and it is necessary that I give you instructions with respect to the meaning of those terms.

They mean simply that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily as opposed to mistakenly or accidentally or as the result

of some coercion or as a result of some negligence.

It is not necessary that the defendant knew that he was violating any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

Unlawfully obviously means contrary to law.

Wilfully means an act done deliberately with knowledge that it was prohibited by law and with the purpose of violating the law. Knowledge of intent exists in the mind.

Since it is not possible to look into a man's mind to see what went on, the only way you have of arriving at a decision on these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances whether the requisite knowledge and intent were present during the time in question.

Direct proof is not necessary. Knowledge and intent may be inferred from all of the surrounding circumstances.

You may consider in determining whether the defendant acted with guilty knowledge or intent the fact,

if you find it true, that the defendant made other false statements similar to those charged in the indictment.

In this connection I would instruct you, too, that if a statement is false and if a defendant did not know it was false, he would nevertheless be acting wilfully if he deliberately closed his eyes to the facts which he had a duty to see.

A person may not circumvent criminal sanctions merely by deliberately closing his eyes to the obvious risk that he was engaging in unlawful conduct.

Now, ladies and gentlemen, when you retire to deliberate,each of you, of course, should exchange views with the other. That is the very purpose of the jury system. You should discuss, weigh, analyze and consider the evidence. You should listen to the arguments put forward by your fellow jurors. You should present your own views and consult with each other and most important, as I have said, you are to do so dispassionately and without emotion and certainly without sympathy or prejudice for or against the defendant or the Government.

Each of you has the right, and I emphasize this, and the duty, of course, to decide for yourself what your verdict will be after consideration and deliberation

with your fellow jurors.

You should not hesitate to change your mind or your opinion after you discuss it with others, provided that you yourself conclude that your initial view is erroneous.

In other words, you have to be willing to discuss the evidence with an open and not a closed mind and to do it dispassionately.

You are not, on the other hand, required to yield a conscientious conviction which you hold simply because you are outnumbered by jurors who may hold an opposite view. Your verdict has to represent your own view.

Now, during your deliberations one or more of your members may have a question of the Court or desire to hear certain testimony read back to you.

You may also have other reasons to communicate with the Court, such as when you have reached a verdict.

If this occurs you should communicate with the Court in a handwritten note. In doing so I must caution you never to indicate in such communication how your vote, if any, stands at that particular time. Your deliberations are secret and it would be a breach of that secrecy to communicate how the jury has voted at any time, except to

announce that you have reached a unanimous verdict.

In the event your members cannot agree unanimously on a verdict after due deliberations, do not indicate to anyone, including the Court, how the jury has voted or why you cannot agree unanimously on a verdict.

Merely indicate that you consider yourselves deadlocked.

Madam Forelady, if I should ask you any questions in court during the course of your deliberations, pause before you answer and carefully consider my question.

If the answer calls for a "yes," "no," or "maybe" reply, give only the reply to my question and do not volunteer any additional statement.

In any event, do not say more than necessary to inform me of your answer.

When you indicate that you have reached a verdict do not indicate what your verdict is. You will be asked to state that orally through your forelady in open court.

The verdict of guilty or not guilty has to be unanimous. All I ask is that if there be an inquiry as to testimony, I would ask you to try and particularize what you want of the testimony read back.

It has been a relatively short trial, but our

court reporter has a fairly large stack of minutes in front of him.

Of course, if you should need any or if you need any other exhibit,send out a note.

I am going to let you take all of these exhibits into the jury room.

I caution you, however, that it appeared to me that some of these exhibits were originals and treat them carefully.

Now, your oath as jurors sums up your duties and that is without fear and without favor you will decide this case and try the issues between the United States and Mr. Leo fairly and to the best of your ability.

I am now going to ask counsel to have one more side bar conference to see if there is anything I should add.

(At the side bar)

MR. KREINCES: If your Honor please, I take exception to your Honor's charge that the amount of the loan, $5000, is irrelevant for the reason--

THE COURT: That's all right. You take exception.

MR. KREINCES: I also take exception to your Honor's charge that one closing his eyes deliberately

may still be found guilty of a crime and I take exception to that in its context and in the way it was placed in the text of your charge.

I respectfully submit that it should have been placed with wilfully and knowingly as a lesser grade of those terms and I request that your Honor possibly qualify it to the extent that when you indicated about deliberately closing his eyes, that that deliberately must be proven beyond a reasonable doubt and that he intended to falsify the statement by closing his eyes.

THE COURT: Denied.

MR. KREINCES: Your Honor doesn't think some --

THE COURT: Denied.

Go ahead.

MR. KREINCES: It is all alone at the end of the charge.

THE COURT: Go ahead.

MR. KREINCES: I have no other exceptions to the charge.

MR. SEAR: No exceptions.

THE COURT: Any additions?

MR. KREINCES: Nothing except the addition I indicated of closing your eyes.

THE COURT: All right.

(In open court)

THE COURT: All right, ladies and gentlemen, there isn't anything to add to the charge.

Mr. Hughes, will you swear the marshal, please.

(Marshal duly sworn)

THE COURT: All right, you may now retire to deliberate.

The two alternates are excused with the thanks of the Court for your attentiveness during the course of this trial.

(Two alternate jurors excused)

(At 11:40 a.m., the jury retired to the jury room to deliberate upon their verdict)

(At 5:47 p.m., the jury returned to the court-room)

THE CLERK: Members of the jury, please answer to your presence as your name is called.

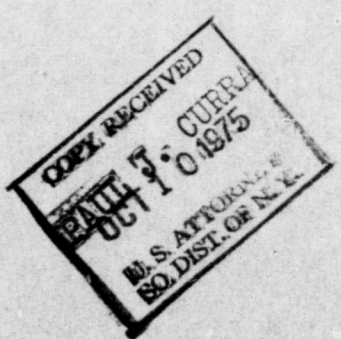
(Jury polled. All present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: What is your verdict as to the defendant Victor Leo?

THE FORELADY: The verdict is guilty.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